FILED
DEC 24 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951.

No. 491

DEAN H. PHIPPS

v.

ALETHEA D. PHIPPS,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

DAVID BERGER,
1516 Girard Trust Building,
Philadelphia 2, Pa.,
Attorney for Petitioner.

Of Counsel:
MILTON J. KOLANSKY,
210 Mears Building,
Scranton, Pa.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Statement	2
Question Presented	5
Specification of Error to Be Urged	5
Reasons for Granting the Writ	5
Conclusion	13

TABLE OF CASES CITED.

	Page
Cole v. Arkansas, 333 U. S. 196	6
Cox v. Armour Fertilizer Works, 237 U. S. 413	12
The Hoppet v. U. S., 7 Cranch 389	6
McEvoy v. Quaker City Cab Co., 267 Pa. 527	12
McFadden v. McFadden, 91 Pa. Super. Ct. 301	10
McHugh v. McHugh, 186 Pa. 197, 10 A. 410	9, 11, 12
Mooney v. Holohan, 294 U. S. 103	11
Railroad Commission of Cal. v. Pacific Gas & Electric Co., 302 U. S. 388	7
Rees v. Watertown, 19 Wall. 107, 22 L. ed. 72	12
Saunders v. Shaw, 244 U. S. 317	13
U. S. v. Throckmorton, 98 U. S. 61	12, 13

MISCELLANEOUS.

	Page
Title 28 U. S. C., Section 1257(3), 28 U. S. C. A. sec. 1257(3)	1
U. S. Constitution, 14th Amendment	5, 7, 11, 13

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 491

DEAN H. PHIPPS

v.

ALETHEA D. PHIPPS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

OPINIONS BELOW.

The opinion of the Pennsylvania Superior Court (R.) is reported at 165 Pa. Super. Ct. 622, 7a A. 2d 465 and the opinions of the Pennsylvania Supreme Court (R. 59a) are reported at 368 Pa. 291 et seq.

JURISDICTION.

The judgment of the Pennsylvania Supreme Court affirming the Pennsylvania Superior Court was handed down June 27, 1951. Within the time allotted, petition for reargument was filed and, after consideration, denied September 24, 1951. The jurisdiction of this Court is invoked under Section 1257(3) of title 28 U. S. C., 28 U. S. C. A. sec. 1257(3).

STATEMENT.

Respondent, Dean H. Phipps sued Petitioner for a divorce, charging cruel and barbarous treatment and indignities to the person pursuant to the provisions of the Pennsylvania Divorce Law, Act of May 2, 1929, P. L. 1237, sec. 10 as amended, 23 Purdons Statutes 10. There was no proof whatever of cruel and barbarous treatment, so that issue disappeared from the case. Adultery was not charged. The issue of adultery was expressly "withdrawn" from the case by respondent (R. 14a).

The proof of personal indignities was so weak that without belief that respondent had committed adultery in the Penn-Stroud Hotel on June 6, 1948 with the parties' chauffeur, no decree of divorce could or would have been entered. All judicial opinions in this case clearly disclose this.

Over petitioner's objections respondent was permitted to show by testimony of one Jean Kehrli, a then 16 year old girl, certain facts, the inference from which was said to be that petitioner slept with the chauffeur in the Penn-Stroud Hotel on June 6, 1948 and then and there committed adultery. The foundation for this inference was Jean Kehrli's testimony that she and petitioner's son by a prior marriage, Bradford Sweet, had slept in the same room in the Penn-Stroud Hotel on the night of June 6, 1948, thus leaving the inference that the chauffeur and petitioner occupied the only other available room in the hotel that night (R.).

Petitioner and the chauffeur denied that they had occupied a room together on June 6, 1948 and denied any misconduct whatever. They testified that Jean Kehrli and petitioner occupied one room, while Bradford Sweet and the chauffeur slept in the other room (R.). Bradford Sweet did not testify.[1]

The hearing judge accepted Jean Kehrli's testimony and, rejecting that of petitioner and the chauffeur, concluded that adultery had been committed and thereupon

1. This fact was significantly noted by the Pennsylvania Superior Court. (R.)

granted the divorce. The hearing judge frankly admitted concern over whether he had power to grant the divorce since adultery had not been charged (R. 573).

After the hearing judge granted the divorce and an appeal was taken to the Pennsylvania Superior Court, petitioner for the first time learned that she had been deprived of the vital testimony of her son, Bradford Sweet, by respondent's bribery of the boy as well as by other misconduct of the respondent. Petitioner thereupon filed in the Superior Court a Petition to Remit the Record for further testimony (R. 565). This Petition to Remit had attached the affidavit of Bradford Sweet which averred that respondent had bribed Bradford Sweet by lavish gifts not to testify; that respondent had poisoned the boy's mind against his mother; that respondent had induced the boy to keep out of the State of Pennsylvania so that he could not be subpoenaed (R. 567); and that if his testimony had not thus been suppressed by respondent, Bradford Sweet would have flatly contradicted Jean Kehrli, upon whose testimony the trial judge had decreed the divorce. The Petition to Remit set forth that petitioner took every reasonable step to obtain the testimony of her son, Bradford Sweet. Although petitioner, when first informed of the reasons why her son would not testify, brought them to the attention of the court then having jurisdiction of the case (the Superior Court) the divorce decree was affirmed. The Superior Court did not expressly deny the Petition but merely referred in its opinion to the fact that Bradford Sweet "did not testify" (R. 561). 165 Pa. Super. Ct. at 624.

The Superior Court's opinion plainly discloses that in affirming the decree of the hearing judge, it relied primarily upon the testimony of Jean Kehrli (R. 561).

Within the allotted time, petitioner filed a petition for allowance of appeal to the Supreme Court of Pennsylvania, which on March 3, 1950 in a per curiam order allowed the appeal.

In the Petition for Allowance of Appeal filed in the Supreme Court of Pennsylvania, petitioner urged, inter

alia, the action of the Pennsylvania Superior Court had deprived her of a fair submission of the case (R. 546-547), and strongly argued this point in the Pennsylvania Supreme Court. The majority opinion of the Pennsylvania Supreme Court interpreted the Superior Court's action as "rejecting the petition to remit", (R. 595) (368 Pa. 291 at 298) and approved it on the ground that Bradford Sweet's "knowledge of the particular subject matter did not in any sense qualify as after-discovered evidence" (R. 595) (368 Pa. 291 at 298). The majority opinion of the Pennsylvania Supreme Court also held in effect that Bradford Sweet would not have been a credible witness, although the trial judge had not seen him or heard his testimony (R. 595) (368 Pa. 291 at 298). But the majority opinion did not even mention the bribery or the false stories told by respondent to petitioner's son despite the fact that, as pointed out by Justice Bell, one of the dissenting justices, "If Brad's accusations of bribery are true, plaintiff would not be entitled to a divorce and this decree in his favor would have to be set aside, even under the majority opinion which admits the testimony of Jean" (R. 604) (368 Pa. 291 at 307).

As a result of this action of the Supreme Court of Pennsylvania, petitioner filed a Petition for Reargument in which she expressly averred that she had been deprived of due process of law in violation of the 14th Amendment to the United States Constitution in that all her marital and property rights have been destroyed by the Court's decision which deprived her of a fair submission of the controversy and setting forth the specific reasons in support of her contention (R. 605).

The Petition for Reargument, timely filed, was denied on September 24, 1951 (R. 541).

QUESTION PRESENTED.

Was petitioner deprived of her marital and property rights without due process of law by the action of the Supreme Court of Pennsylvania in affirming the decree of divorce and rejecting the petition to remit the record for the testimony of Bradford Sweet in that (a) petitioner never had that fair and open hearing assured to every litigant as a minimal requirement of the 14th Amendment because respondent, through bribery, lies and suppression prevented her from presenting the vital testimony of her own son on the crucial issue of adultery; (b) the case was decided by the Pennsylvania Supreme Court in such a way that petitioner has not had a proper opportunity to present her evidence; (c) the Supreme Court passed upon and discredited the credibility of this crucial witness for petitioner although the hearing judge never saw or heard Bradford Sweet and despite the fact that petitioner never had the opportunity to present his testimony to any court; and (d) the Supreme Court of Pennsylvania in effect enforced a judgment void because of fraud extrinsic to the record of a type traditionally relieved against, and of the kind that renders the judgment as invalid as if there had been no proper service or process upon her?

SPECIFICATION OF ERROR TO BE URGED.

The Supreme Court of Pennsylvania erred in affirming the divorce decree and rejecting the prayer of the Petition to Remit the record to the trial judge for the taking of Bradford Sweet's testimony. The refusal of the Supreme Court to remand the case was not merely erroneous but resulted in denying petitioner due process.

REASONS FOR GRANTING THE WRIT.

1. Every state is in every divorce case an important and interested third party. The destruction of marital and property rights without strict adherence to the require-

ment that parties be accorded a fair trial with a fair opportunity to present evidence to the fact-finding tribunal is therefore a matter of great importance to all the states of the Union as well as to the petitioner, the individual harmed by the action of the lower court in this case. There is therefore a very real and substantial public interest in the question presented by this petition. The serious social and economic consequences of easy divorces need no elaboration here. The obtaining of divorces by improper means should certainly not be tolerated, particularly where marital and property rights are destroyed without that fair and open hearing guaranteed to every litigant by the 14th Amendment.

2. Respondent was granted a divorce because of the single act of alleged adultery, although adultery was never charged by respondent. As Mr. Justice Stearne held in his dissenting opinion, "The complaint charged personal indignities. A single clandestine act of adultery was alleged. . . . There was no charge of adultery in the complaint. . . . My review of the testimony convinces me that *without the testimony of adultery*, plaintiff has not established a case of personal indignities" (R. 57; 368 Pa. 291 at pp. 299, 300). Hence, petitioner, is convicted of adultery with its consequent shame and loss of marital and property rights although never even charged with adultery. The affirmance of the divorce decree in effect affirmed the conviction of adultery though petitioner was never so charged. In criminal cases, such an affirmance would clearly violate due process. *Cole v. Arkansas*, 333 U. S. 196, 201; *cf. The Hoppet v. U. S.*, 7 Cranch 389, 393. True, this was not a criminal case, but considering the state's interest in every divorce, the harsh consequences to petitioner and the fact that this divorce decree is based on the alleged adultery the analogy to criminal cases seems apt. Certainly, the requirements of due process ought not to be any more easily cast aside in divorce actions than in reviewing the conduct of criminal prosecutions.

3. Petitioner did not receive that fair and open hearing assured to every litigant by the Federal Constitution as a minimal requirement of the 14th Amendment. *Railroad Commission of Cal. v. Pacific Gas & Electric Co.*, 302 U. S. 388.

In the Pennsylvania Courts, petitioner contended that, as a matter of Pennsylvania law, respondent was not entitled to a decree of divorce on any other ground than that alleged and that there had been total failure to prove personal indignities. Petitioner further contended that proof of a single clandestine act of adultery was not admissible, nor if admitted, competent or sufficient to prove personal indignities. The Pennsylvania Supreme Court in its majority opinion rejected these contentions. In doing so, Bradford Sweet's testimony became significantly more important. The only proof of the adultery is the testimony of Jean Kehrli which is flatly contradicted by Bradford Sweet. Yet, petitioner is by the action of the court below denied the opportunity to present Bradford Sweet's testimony. In this regard, Mr. Justice Bell, dissenting held: (R.603,604 368 Pa. 291, 305, 306, 307).

> "If, however, we assume that the majority opinion is correct in holding that evidence of the defendant's alleged adultery was admissible and that she, the defendant, was guilty of adultery, the majority's statements and conclusions with respect to the defendant's petition to remand are unjustifiable!
>
> The decision of the trial judge was based almost entirely upon the alleged adultery of the defendant in Stroudsburg on June 6, 1948. The Superior Court likewise placed tremendous importance upon this episode. Jean testified that at Mrs. Phipps's direction she (aged 16) and Brad Sweet (son of Mrs. Phipps) occupied the room at the hotel with the twin beds, while Mrs. Phipps and the chauffeur slept in the room with the double bed. Of course this testimony was vigorously

objected to by the defendant as inadmissible and hearsay. Jean's testimony was contradicted by defendant and the chauffeur, both of whom testified that the defendant and the girl occupied one room while Brad and the chauffeur occupied the other. Brad did not testify. The trial judge believed Jean, although her subsequent conduct certainly cast considerable doubt on her credibility.

Defendant presented a petition to the Superior Court requesting it to remand the record to the trial court for the purpose of taking the testimony of Brad Sweet who, according to the petition and Brad's attached affidavit, would testify to his mother's innocence and that Jean and his mother occupied one room that night and he and the chauffeur the other room. Brad's affidavit alleged in effect that libellant had bribed him not to testify and had also poisoned his mind against his mother by false stories and had induced him to keep out of the State of Pennsylvania so that he could not be subpoenaed.

The Commonwealth is in every divorce case an important and interested third party and it seems to me that bribery and suppression of evidence are matters of such importance to the Commonwealth that on this ground alone defendant's petition to remand should have been granted. If Brad's accusations of bribery are true, plaintiff would not be entitled to a divorce and the decree in his favor would have to be set aside, even under the majority opinion which admits the testimony of Jean. The majority opinion does not discuss plaintiff's alleged bribery; it merely describes Brad's affidavit as cumulative evidence in favor of his mother and assumes that the Superior Court took this cumulative effect into consideration 'in rejecting petition to remit'. Unfortunately for the majority's assumption, the Superior Court did not dismiss defendant's petition

or even mention the petition or the affidavit at all. Even more unjustifiable, to put it mildly, is the majority's assumption that the trial judge would disbelieve Brad and continue to believe Jean, although the trial judge had not seen Brad or heard his story.

If evidence of adultery unknown to the plaintiff is admissible, as the majority opinion holds, then in the interest of justice the majority should at least remit the record to the court below with directions to reopen the proceedings and after hearing and considering the grave accusations made by Brad Sweet, make such decision on the merits of the divorce case as may be proper and just."

We submit that the refusal so to remit the record to the trial judge not only disregarded "the interest of justice" but did so in such a shocking manner as to violate due process.

4. That respondent had bribed Bradford Sweet not to testify, had poisoned his mind against his mother by false stories and had induced him to keep out of the State of Pennsylvania so that he could not be subpoenaed were in themselves facts which should have been considered by the trial judge in reaching his ultimate determination. Quite apart from the truth or falsity of Bradford Sweet's proposed testimony denying petitioner's adultery and supporting her innocence, respondent's corruption of petitioner's son was such improper conduct which necessarily would have stamped his entire case against his wife as fraudulent. It would be difficult to conceive of more relevant evidence. *McHugh v. McHugh*, 186 Pa. 197, 203, 40 A. 410, where the Pennsylvania Supreme Court holds that "evidence of the misconduct of a party in connection with the trial is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause, or is conscious that it is an unjust one." The *McHugh* case is the leading Pennsylvania case on the subject of the rele-

vance of a party's misconduct in connection with the trial of his case.

The action of the Supreme Court is all the more surprising since the Pennsylvania Courts have consistently recognized and applied the rule that a judgment or decree procured through "extrinsic or collateral fraud" promptly complained of after its discovery will be set aside even after the expiration of the term during which it was entered. This rule is peculiarly appropriate to divorce cases. *McFadden v. McFadden*, 91 Pa. Super. Ct. 301, 305, 306, where the court held:

> The authorities are clear that such a decree will not be disturbed after the expiration of the term except for extrinsic or collateral fraud promptly complained of after its discovery. This case is ruled by McEvoy v. Quaker City Cab Co., 267 Pa. 527, and Powell v. Doyle, 77 Pa. Superior Ct. 520. The respective opinions in these cases, written by Mr. Justice STEWART for the Supreme Court and by Judge LINN for this court, review all the applicable cases and announce the rule we have just stated. In the Powell case we adopted the following definition or description of 'extrinsic or collateral fraud' (stated in U. S. v. Throckmorton, 98 U. S. 61, and in Bleakley v. Barclay, 75 Kansas 462, and approved by our Supreme Court in the McEvoy case), together with the distinction between extrinsic and intrinsic fraud: 'By the expression "extrinsic or collateral fraud" is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy. Among these are the keeping of the defeated party away from court by false promise of compromise, or fraudulently keeping him in ignorance of the action. Another instance is where an attorney without authority pretends to represent a party and corruptly connives at his defeat, or where an attorney has been regularly employed and corruptly sells out his client's interest. The fraud in such case is extrinsic or

collateral to the question determined by the court. The reason for the rule is that there must be an end to litigation; and, where a party has had his day in court and knows what the issues are, he must be prepared to meet and expose perjury then and there: Pico v. Cohn, 91 Cal. 129. Where the alleged perjury relates to a question upon which there was a conflict, and it was necessary for the court to determine the truth or falsity of the testimony, the fraud is intrinsic and is concluded by the judgment, unless there be a showing that the jurisdiction of the court has been imposed upon, or *that by some fraudulent act of the prevailing party the other has been deprived of an opportunity for a fair trial.*'" (Emphasis added.)

Here, the fraud complained of by petitioner in her Petition to Remit filed in the Superior Court was extrinsic or collateral fraud in that by the fraudulent acts of respondent, she has been denied by the prevailing party of a fair submission of the controversy and, indeed, the opportunity for a fair trial. *McHugh v. McHugh*, 186 Pa. 197, 40 A. 410.

Clearly, this extrinsic and collateral fraud was promptly complained of to the Superior Court, which was the only Pennsylvania Court then having jurisdiction over the controversy.

In this respect, petitioner's case is stronger than that of the petitioner in *Mooney v. Holohan*, 294 U. S. 103, where this Court held that even though fraud be *not* extrinsic to the record, if a state contrives to convict a defendant through the knowing use of perjured testimony the conviction is void for denial of due process. In the *Mooney* case, the respondent conceded that where a defendant is prevented from presenting evidence in his defense, due process is violated. This Court was "unable to approve this narrow view of the requirement of due process". Even under the "narrow view of the requirement of due process", petitioner's rights guaranteed by the 14th Amendment were

violated since, plainly, she was prevented from presenting Bradford Sweet's evidence of her innocence. Perhaps even more important is the fact that by the action of the court below petitioner was deprived of her opportunity to present to the fact-finding tribunal the evidence of respondent's corruption of her own son in connection with this case. That evidence was highly relevant, apart from the evaluation to be placed upon it by the fact-finding tribunal. *McHugh v. McHugh, supra.*

It is no answer to say that in this particular case, petitioner was not harmed because in any event the trial judge would not have believed Bradford Sweet. *Cox v. Armour Fertilizer Works,* 237 U. S. 413 where this Court held that "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

To assume that Bradford Sweet lied in his affidavit without the slightest opportunity to have him testify, to be seen and to be heard is to assume against petitioner the very point in contest. This violates due process. *Rees v. Watertown,* 19 Wall. 107, 123, 22 L. ed. 72, 77.

5. The action of the Court below in effect enforces a void judgment or decree against petitioner. Because of the collateral or extrinsic fraud the decree procured by respondent must be relieved against. *U. S. v. Throckmorton,* 98 U. S. 61; *McEvoy v. Quaker City Cab Co.,* 267 Pa. 527. In this sense, the decree is no more entitled to enforcement than one procured without proper service of process. To enforce a decree thus procured violates due process which should be relieved against by this Court.

The respondent's fraud in this case had the same effect as failure to give proper notice to petitioner. By respondent's bribery, false stories poisoning Bradford Sweet's mind against his mother (petitioner) and by inducing him to keep out of Pennsylvania so that he could not be sub-

poenaed, petitioner was effectively deprived of a fair submission of the controversy; indeed, petitioner was thereby denied the opportunity to present evidence essential to her defense. By respondent's fraud and deception, petitioner has been prevented from exhibiting fully her case. *U. S. v. Throckmorton, supra.* The action of the Pennsylvania Appellate Courts has the effect of enforcing a judgment, as much void for federal reasons as if there had been lack of proper service. This, in the face of a timely complaint by petitioner of the extrinsic fraud. Hence, due process was violated.

As Mr. Justice Bell, dissenting concluded, "If evidence of adultery unknown to the plaintiff is admissible, as the majority opinion holds, then in the interest of justice the majority should at least remit the record to the Court below with direction to reopen the proceedings and after hearing and considering the grave accusations made by Brad Sweet, make such decision on the merits of the divorce case as may be proper and just" (R*64*, 368 Pa. 291, at p. 307).

The failure of the Court below to make such a remission not only violated the interest of justice but, so shockingly as to violate due process. Without Bradford Sweet's vital testimony, petitioner did *not* have her day in court. It is submitted that the decision of the Court below denies petitioner a proper opportunity to present her evidence. Hence, due process was violated. *Saunders v. Shaw,* 244 U. S. 317.

CONCLUSION.

Petitioner loses all of her marital and property rights by this divorcee decree. Respondent is the beneficiary of his own fraud and deception. Petitioner did not have a fair, full, day in court. Basic, fundamental rights protected by the 14th Amendment to the U. S. Constitution were violated to her substantial harm in an important and constantly recurring type of case.

For the reasons set forth, it is submitted that certiorari should be granted and the decree set aside.

Your petitioner, therefore, believes that this application presents a case cognizable by your Honorable Court under the Constitution of the United States and the decisions of your Court, and one eminently proper for review, wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings in said suit, proceeding or matter, and to stand to and abide by such order and direction as this Court shall deem meet under the circumstances of the case, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem just and proper.

ALETHEA D. PHIPPS,

By her Counsel:
DAVID BERGER,
Attorney for Petitioner.

Of Counsel:
MILTON J. KOLANSKY.

3

Office - Supreme Court,
FILED
FEB 4 1952
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

October Term, 1951

No. 491

DEAN H. PHIPPS

v.

ALETHEA D. PHIPPS,
Petitioner

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RAYMOND T. LAW,
500 Scranton Life Building,
Scranton (3), Pa.,
Attorney for Respondent.

Of Counsel:
WILL LEACH,
JOHN R. LENAHAN,
Of: LEACH & LENAHAN,
516 Scranton Life Building,
Scranton (3) Pa.

Murrelle Printing Company, Law Printers, 201-3 Lockhart St., Sayre, Pa.
Robert A. Hetz, Lackawanna County Representative, 146 Adams Avenue,
Scranton 3, Pa.

INDEX TO BRIEF

	Page
I. Counter-Statement	1
II. Reasons for denial of Writ	3
I. The judgment of the State Court rests on adequate State grounds and no Federal question is involved	3
II. It is too late to raise a Federal Question for the first time in a petition for re-argument, after the final judgment of the State Court of last resort	11
III. Conclusion	14

TABLE OF CITATIONS

Bergman vs. Backer, 157 U. S. 655	9
Bowe vs. Scott, 233 U. S. 658	13
Butler vs. Gage, 138 U. S. 52	12
Central Land Co. vs. Laidley, 159 U. S. 103, 112	9
Chapin vs. Fye, 179 U. S. 127	11
Ennis Water Works vs. City of Ennis, 233 U. S. 652 658	3
Forbes vs. State Council of Virginia, 216 U. S. 396, 398, 399	13
Hamblin vs. Western Land Co., 147 U. S. 531, 532	3
McCorquodale vs. State of Texas, 211 U. S. 532, 347	12

McDonald vs. Oregon R. R. & Navigation Co., 233 U. S. 665 8
Miller vs. Cornwall R. R. Co., 168 U. S. 131 11
Sayward vs. Denny, 158 U. S. 180, 183 13
Seaboard Air Line Ry. Co. vs. Watson, 287 U. S. 86 10
Spies vs. Illinois, 123 U. S. 131 12
Sugarman vs. U. S., 249 U. S. 182 10
Thomas vs. Iowa, 209 U. S. 258 12
U. S. Fidelity & Guaranty Co. vs. State of Oklahoma, 250 U. S. 111, 112 3
U. S. vs. Throckmorton, 98 U. S. 61, 65 ..... 4, 6
Wade Holley vs. State of Georgia, 314 U. S. 576 .. 13
Wilson vs. North Carolina, 169 U. S. 586 4

I. COUNTER-STATEMENT

Respondent, Dean H. Phipps, under applicable Pennsylvania law sued petitioner for a divorce A. V. M. charging cruel and barbarous treatment and indignities to the person. The proof offered sustained the charge of indignities to the person.

The decree in divorce entered by the lower court on March 7, 1949, was sustained by the intermediate Pennsylvania Superior Court (R. 564) argued twice before the Pennsylvania Supreme Court, and on June 27, 1951, this Court of last resort in Pennsylvania sustained the divorce decree. In the interim, respondent paid petitioner, in addition to counsel fees and costs, alimony pendente lite of $112.50 weekly from March 5, 1949 (R. 577).

Petitioner, after appealing to the Superior Court, filed a petition to remit the record to the lower court because she was allegedly deprived of the testimony of her son by a first marriage, Bradford Sweet (R. 565). Respondent filed a responsive answer denying the allegations of bribery and suppression of testimony (R. 575), and alleged, as was noted by the Supreme Court (R. 618) that the son's whereabouts was known to petitioner and she had every opportunity to secure his testimony by deposition if she so desired.

The Superior Court in affirming the divorce decree rejected the petition to remit, and this action was in turn sustained by the Supreme Court.

Counter-Statement

Petitioner, in her petition for reargument to the Supreme Court, for the first time raised a Federal question, denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution (R. 605, 610). The petition for reargument, on September 24, 1951, was denied per curiam.

II.
REASONS FOR DENIAL OF WRIT

I. THE JUDGMENT OF THE STATE COURT RESTS ON ADEQUATE STATE GROUNDS AND NO FEDERAL QUESTION IS INVOLVED

The only question raised by this petition, is whether or not the court of last resort in Pennsylvania, by rejecting the prayer of the petition to remit the record to the trial judge for the taking of the testimony of petitioner's son, Bradford Sweet, was denial of due process in violation of the Fourteenth Amendment to the United States Constitution?

It is well established law, that to give this court jurisdiction of error to a state court, mere assertion of a claim in respect of some constitutional right is not sufficient; there must be a real and substantial controversy of the required character which deserves serious attention.

> *U. S. Fidelity & Guaranty Co. vs. State of Oklahoma,* 250 U.S. 111, 112;
>
> *Ennis Water Works vs. City of Ennis,* 233 U. S. 652, 658.

A mere averment of a federal question is not sufficient. As stated by this court in *Hamblin vs. Western Land Co.,* 147 U.S. 531, 532:

> "A real, and not a fictitious, federal question is essential to the jurisdiction of this court over

the judgments of state courts. Millinger vs. Hartupee, 6 Wall. 258; New Orleans vs. New Orleans Water Works Co., 142 U.S. 79, 87. In the latter case it was said. 'The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question can and might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

See: *Wilson vs. North Carolina,* 169 U.S. 586.

In the case of *Sawyer vs. Piper,* in 189 U.S. 154, this court held, that where the only federal question alleged, was that of the refusal of a state court to allow the plaintiff in error to file a supplementary answer in a suit, in which foreclosure and sale had been decreed and sustained by the highest court of the state, was taking of property without due process of law, and a denial of equal protection of the laws, and the trial court did not appear to have abused its discretion, there is no real federal question involved and the writ of error will be dismissed.

This court in *U. S. vs. Throckmorton,* 98 U.S. 61, 65, a case cited by petitioner, gave voice to the legal maxim "interest rei publicae, ut sit finis litium." It is in the interest of the state that there should be an end to a law suit. Unless this court followed such a rule, litigation could and would be interminable.

Analysis of the grounds set forth in the petition for writ of certiorari reveals certain basic fallacies in

the legal arguments of the petitioner. She evidently believes that when a state court fails to decide an issue in her favor, namely, its refusal to remand the record to the trial judge to take the testimony of her son, even though she had every opportunity to present her side of the issue, that, in and of itself, constitutes a denial of due process, and consequently involves a violation of her federal rights.

In this regard, it should also be noted, that she objects to the action of the intermediate Pennsylvania Superior Court in not expressly denying her petition to remit, in that, it deprived her of a fair submission of her case. This, even though, she proceeded directly on appeal to the Court of last resort of the state, when, if she desired to press this point, she could have petitioned the Pennsylvania Superior Court for a rehearing or reargument on the issue of its alleged failure to deal directly with her petition to remit or remand the record to the hearing judge for further proceedings.

Petitioner further labors under the erroneous impression that by alleging fraud, a federal question is thereby raised. The charges of bribery and suppression of testimony, first set forth in the petition to remit or remand the record and again repeated here, were specifically and vigorously denied by respondent (R. 574, 575). The testimony petitioner's son would have given was made known to both the intermediate Pennsylvania Superior Court, and the court of last resort, in his affidavit which set it forth in detail without opportunity to counsel for respondent to cross examine him or impeach his credibility.

A state court has authority under its own decisions and in its own application of legal wisdom, to deal with allegations of fraud. When a state court decides the issue in favor of one party rather than his adversary, a federal question does not thereby automatically present itself.

Furthermore, the type of fraud, alleged by petitioner, even if true, is not the type that would vitiate a judgment or a decree. The very case referred to by petitioner, *U. S. vs. Throckmorton,* cited supra, holds that the fraud alleged must be something done by a successful party to a suit by reason of which, there was in fact no adversary trial, or decision of the issue in the case.

Here, the state courts have squarely met the issue or issues involved. Petitioner has had every opportunity to bring before and argue to both State courts, not only the circumstances surrounding her allegations of bribery and suppression of testimony, but also the content of the very evidence she could have brought before the court had the record been remanded to the hearing judge.

The doctrine is well settled, that this court will not set aside a judgment because it was founded on a fraudulent instrument, or prejudicial evidence, or for any matter which was actually presented and considered in the judgment assailed. See: *U. S. vs. Throckmorton,* cited supra. The matters complained of by petitioner were presented to and considered by the state court. She has had a fair and open hearing on these matters, as well as every opportunity to present her side of the controversy.

It further appears, that petitioner could have secured the testimony of her son by deposition, or could have served a subpoena upon him at the time of the original hearing. Justice Jones speaking for the Pennsylvania Supreme Court in reference to the refusal to remit the record, specifically answered the objections of petitioner and observed (R. 617, 618):

> "The Superior Court was fully warranted in not granting the prayer of the petition for a remission of the case to the court below for the purpose of taking the testimony of the respondent's son, Bradford Sweet. His knowledge of the particular subject matter did not in any sense qualify as after discovered evidence what he knew, and his whereabouts in Auburn, New York, where he was living with his natural father, with his mother's permission, were, of course, well known to her at the time of the divorce hearing. If she desired his testimony, it could have been taken by deposition when he refused to come to Scranton to testify. The hearings extended intermittently over a period of three months during which time Bradford spent the Christmas holidays in Scranton (although unknown to his mother), visiting at the home of friends."

It needs no citation of authority, to state, that a judgment will not be enjoined or vacated, however plainly it may appear that defendant had a good legal defense, which was not presented or considered through the oversight of counsel, *or from failure on the part of the defendant to collect the evidence in due season and present it in a way to be available.*

The due process clause of the Fourteenth Amendment does not control methods of state procedure, or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties, and within the scope of its authority concerning matters non-federal in character.

McDonald vs. Oregon R. R. & Navigation Co., 233 U.S. 665.

The petitioner has been given every opportunity to effectively present and substantiate her side of the controversy. In addition, during the pendency of the appeals she has received over $16,000.00 in support payments, as well as costs and counsel fees. It would appear that her marital and property rights have been protected, to an extreme, only possible under our system of justice.

However, the court of last resort of Pennsylvania in its opinion went further than to say that Sweet's testimony could be secured by deposition. It stated (R. 618):

> "But, even if the proffered testimony, as forecast by Sweet's affidavit and respondent's petition to remit, were received in evidence, it would be merely cumulative testimony of the respondent, and her witness Martin, in an attempted refutation of Jean Kehrli, a witness for the libellant, whom the trial judge in the Superior Court justifiably accredited. Moreover, the unfilial reasons to which Sweet's affidavit confesses as being the cause of his not having attended the divorce hear-

ing, tends to impeach his credibility, which undoubtedly the Superior Court also took into consideration in rejecting the petition to remit."

It is not a denial of due process for a state court to believe one witness and disbelieve another. This court has repeatedly held, that when the parties have been fully heard in the regular course of judicial proceedings, even an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law.

See: *Central Land Co. vs. Laidley*, 159 U.S. 103, 112;

Bergman vs. Backer, 157 U.S. 655.

Petitioner in assigning reasons for the granting of this writ emphasizes the interest of the state in divorce proceedings, and speaks of the statutory safeguards surrounding allegations of adultery, as well as the inference of conviction of adultery with its consequent shame and loss of marital and property rights. It should be noted, that adultery was never charged, and that if it had been, and was proved, petitioner would not have been entitled to or paid alimony during the pendency of the appeals and until the court of last resort of Pennsylvania decided the issue. By statute, adultery is made a separate and distinct ground for divorce, and is of such gravity that, when established, prohibition of the marriage of the offending spouse to the paramour follows as a matter of legislative direction, and the statute in the State of Pennsylvania further requires that the paramour be named in the libel and, as corespondent, be given notice of the charge

and the opportunity to defend. Here, the putative paramour appeared in court as a witness for the petitioner. However, the statutory provision is peculiar to an action in which adultery is pleaded and proven. It still does not deprive the adulterous conduct of its evidentiary value as relevant and material proof of an indignity. Cruel and barbarous treatment is a separate ground for divorce, but evidence of respondent's physical violence toward and threats against the life of libellant is relevant and material to, and may be used to sustain a charge of indignities. The greater offense is material evidence of the lesser charge.

It is fundamental that an appeal from a state Supreme Court should be dismissed where no substantial constitutional question is presented. See:

Seaboard Air Line Ry. Co. vs. Watson, 287 U. S. 86;

Sugarman vs. U. S., 249 U. S. 182.

Here, where no substantial constitutional question is involved, and the decree of divorce entered by the lower court, and sustained by the Court of last resort of the State of Pennsylvania rests upon adequate state grounds, the petition for writ of certiorari should be dismissed.

II. IT IS TOO LATE TO RAISE A FEDERAL QUESTION FOR THE FIRST TIME IN A PETITION FOR REARGUMENT, AFTER THE FINAL JUDGMENT OF THE STATE COURT OF LAST RESORT

The statement of the case, in the petition for writ of certiorari, admits there was no express averment of deprivation of due process of law in violation of the Fourteenth Amendment to the United States Constitution until after the final judgment of the court of last resort in the State of Pennsylvania. There is an inference, that petitioner in her petition for allowance of an appeal from the intermediate Superior Court of Pennsylvania to the Supreme Court, alleged she was deprived of a fair submission of the case. However, a thorough review of the record reveals that no federal question was ever raised, until the petition for reargument.

Nothing is clearer, and this court holds, that the clause in the Constitution, or the law of Congress under which the right, title, privilege or immunity shall be set up or claimed must be specified by the plaintiff in error in the state court. See:

Chapin vs. Fye, 179 U.S. 127;

Miller vs. Cornwall R. R. Co., 168 U.S. 131.

A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give this court jurisdiction to determine whether there has

been a violation of the Fourteenth Amendment to the Constitution. See:

Thomas vs. Iowa, 209 U.S. 258.

Here petitioner attempts to imply that a federal question was raised by inference prior to the decision of the court of last resort. An inference is not sufficient. It must be specifically set up. The federal question when not presented prior to the decision of the court of last resort of the state comes too late.

Spies vs. Illinois, 123 U. S. 131;

Butler vs. Gage, 138 U.S. 52.

This court, in *McCorquodale vs. State of Texas,* 211 U.S. 432 at page 437 stated, in an opinion by Mr. Justice McKenna:

> "This court has decided many times that it is too late to raise a federal question for the first time in a petition for re-hearing in the court of last resort in a state after that court has pronounced its final decision. Loeber vs. Schroeder, 149 U. S. 580, 585; Pim vs. St. Louis, 165 U.S. 273. It is true that we have also decided that if the court entertains the motion and passes on the federal question, we will review its decision. But, it must appear that the court has done so. Mallett vs. North Carolina, 181 U.S. 589; Leigh vs. Green, 193 U.S. 79; Corkran Oil Co. vs. Arnaudet, 199 U.S. 182, 193; Fullerton vs. Texas, 196 U.S. 192; McMullen vs. Ferrum, 197 U.S. 343. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the

motion. In other words, it expresses no more than would be implied by a simple denial of the motion."

In the case at bar, the petition for reargument which first raised the federal question was denied per curiam by the court of last resort of the State of Pennsylvania.

This court has repeatedly reaffirmed its position that an attempt to introduce a federal question for the first time by petition for rehearing, is too late, unless the state court entertains, and in fact, passes upon it. See:

Wade Holley vs. State of Georgia, 314 U.S. 576;

Forbes vs. State Council of Virginia, 216 U. S. 396, 398, 399;

Bowe vs. Scott, 233 U.S. 658;

Sayward vs. Denny, 158 U.S. 180, 183.

Where, as here, the order is merely a denial of the motion the writ of error will be dismissed.

III.
CONCLUSION

The decree of divorce entered by the lower court and sustained by both state Appellate Courts rests upon adequate state and non-federal grounds. Since petitioner has had all matters now raised by her properly passed on by the State courts, and since she has been given a full, fair and open hearing with every opportunity to present her side of the controversy, no federal question is involved.

Furthermore, even if a federal question was involved it is too late, as petitioner attempts to do, to raise it for the first time in a petition for reargument after the final judgment of the State court of last resort.

Hence, this court is respectfully urged to dismiss the petition for writ of certiorari to the Supreme Court of Pennsylvania.

DEAN H. PHIPPS,

By his Counsel:
RAYMOND T. LAW,
Attorney for Respondent.

Of Counsel:
WILL LEACH,
JOHN R. LENAHAN,
Of: LEACH & LENAHAN.